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Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law

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Abstract

*Discussions surrounding the concept of the international state crime have focused to a large extent on the mode of reaction to breaches of peremptory norms of the international legal order. In particular, the question arose whether UN mechanisms aimed at preserving international peace and security should be regarded as a privileged — or even exclusive — means to implement this type of ‘aggravated’ responsibility. Drawing on Security Council practice, Special Rapporteurs Ago and Riphagen suggested that UN organs should play a central role in such a situation. Ascribing a central function to UN organs in reaction to international crimes has, however, drawn criticism on several grounds, such as the limits to the Security Council’s *ratione materiae* competence and its lack of legitimacy in representing the international community. Proposals to develop new institutional mechanisms, put forward by Arangio-Ruiz, have, however, proved no more successful, and have been condemned as ‘utopian’. Article 54 of the final version of the Articles on State Responsibility appears to leave the question open, since, following Special Rapporteur Crawford, the ILC chose not to exclude any specific mode of reaction to serious breaches of peremptory norms of international law, whether carried out within or outside existing international institutions. This probably better reflects the present state of institutionalization of the international society.*

The various contributions to this symposium are a reminder of the extent of the debate which has been provoked by the idea of establishing a qualitative distinction between breaches of different types of international law obligations within the framework of the law of international responsibility. These debates seem to centre round the manifest uncertainties surrounding the system of responsibility for

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international crimes and the specific consequences that should attach to serious breaches of the peremptory norms of the international legal order. In particular, many questions have emerged on the ways of responding to breaches of these essential norms: given that the recognition of special categories of obligations (breach of which could affect all states) implied the move from a relation of responsibility as traditionally conceived in a bilateral framework (responsible state *vis-à-vis* injured state) to a multilateral relationship (responsible state *vis-à-vis* all other states),¹ was there not a need for the response to breaches of such norms to be set within a collective, organized or institutional framework? Therefore, should the mechanisms and procedures instituted by the United Nations Charter, specifically with an eye to ensuring the maintenance of international peace and security, not be regarded as offering a privileged — not to say exclusive — means of implementing such ‘aggravated’ responsibility?

This question, initially raised in the context of developing the notion of an international crime, lost nothing of its acuteness when it came to the differentiated system of responsibility proposed by the International Law Commission (ILC), replacing the distinction between crimes and delicts by building on the concept of a ‘serious breach of obligations under peremptory norms of general international law’.² Whether falling within one or other of these frameworks, the questions relating to implementing this sort of system of aggravated responsibility in fact proved identical in essence. That explains why, in seeking to set out the terms and issues in this debate, we shall refer both to discussions regarding the system of responsibility for crimes as background and to the more recent debates regarding the new form of aggravated responsibility proposed by the ILC.

Analysis of the ILC’s work demonstrates that the concern to institutionalize the response to international crimes was a central concern which took shape only once the system for dealing with serious breaches of obligations resulting from peremptory norms of international law was defined. Assigning a prime role to the United Nations was a constant feature of the proposals formulated in this connection. From the initial conceptualization of the notion of an international crime, Roberto Ago, the Special Rapporteur, insisted on the fact that perpetration of such a crime amounted to an attack on the international community as a whole, with the logical result that the response to such a breach of international law ought to remain under the control of the organs of this international community. The Special Rapporteur, referring to the risks that a right of individual response by each state to a breach of obligations *erga omnes* was liable to bring, said he understood:

That a community such as the international community, in seeking a more structured organization, even if only an incipient ‘institutionalization’, should have turned . . . towards a

¹ See Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *RdC* (1994-VI) 217.

² See Part Two, Chapter III, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted on second reading by the ILC in 2001, in ILC Report on its 53rd Session to the General Assembly, UN Doc. A/56/10. The Draft was adopted unchanged by the UN General Assembly on 12 December 2001 (text annexed to Resolution 56/83).

system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented. Under the United Nations Charter, those responsibilities are vested in the competent organs of the Organization.³

Similarly, in his attempts to define the consequences of international crimes, Special Rapporteur Riphagen systematically referred to the UN as representing the ‘organized’⁴ international community. The central role the UN should be allotted in this area was repeatedly reaffirmed subsequently, both within the ILC and by various observers attentive to the evolution of the law of international responsibility.⁵ Constant though it was, this reference to the role of the institutions and mechanisms of the UN in implementing the consequences of international crimes and of serious breaches of obligations resulting from peremptory norms of international law nonetheless took shape in two different forms. While some commentators seemed content with using existing mechanisms (Section 1), others contemplated new institutional structures for the same end (Section 2). We shall see, however, that a number of objections to this desire for institutionalization were formulated, which highlighted the limits to the possibility of recourse to the organs and mechanisms of the UN in the context of implementing aggravated responsibility of states. Over and above a ‘simple’ academic or theoretical debate, it seems that these opposing views on the ways of responding to the most serious breaches of the peremptory norms of the international legal order call into question the adequacy of the attempts to institute a system of aggravated responsibility of states — and the consequences that such a system would entail — in the present state of the institutionalization and cohesion of international society.

1 The Institutionalization of Responses to International Crimes or Serious Breaches of Obligations Arising from Peremptory Norms Through Recourse to Existing Structures

As noted above, it was first and foremost with reference to existing institutional structures — specifically to those of the United Nations — that the structuring of responses to crimes in international law or serious breaches of peremptory norms of international law was considered (section A below). Such solutions appeared particularly appropriate in terms of both economy of means (avoiding the creation of new institutional structures) and the harmonization of responses to serious attacks on

³ Eighth Report on State Responsibility, *ILC Yearbook* (1979), vol. II, Part One, at 43, paras 91 and 92, respectively.

⁴ Third Report on the Content, Forms and Degrees of International Responsibility, *ILC Yearbook* (1982), vol. II, Part One, at 48 and 49, paras (5) and (14); Fourth Report on the Content, Forms and Degrees of International Responsibility, *ILC Yearbook* (1983), vol. II, Part One, 11, para. 60.

⁵ For more details, see below.

the fundamental interests of international society (whether following the perpetration of an international crime or because of threats to international peace and security). Despite their apparent advantages, these proposals were, however, subjected to severe criticism based principally on the inadequacy or unsuitability of UN mechanisms for the purposes of implementing a system of aggravated responsibility (section B below).

A Recourse to Existing Mechanisms

Since Ago's departure from the ILC had prevented him from delineating out more precisely the outlines of the system of responsibility for crimes, it was Riphagen who first took on this daunting task. Riphagen very quickly established a link between the system of aggravated responsibility that the ILC was to design and some of the mechanisms instituted by the United Nations Charter for the maintenance of international peace and security. This link seemed particularly clear in the case of aggression. As Riphagen put it:

Indeed, in respect of the first example of such an international crime, [appearing in Article 19(3) of the Ago Draft], namely, 'a serious breach' of the prohibition of 'aggression', the international community as a whole must be considered to adhere to the Charter of the United Nations including the powers and functions of the competent organs of the United Nations and the right recognized in Article 51 of the Charter.⁶

But, for Riphagen, this did not mean that the involvement of UN organs was limited to this first category of crime:

Other cases of international crime may well create a situation in which the provisions of the United Nations Charter relating to the maintenance of international peace and security are also directly applicable . . . Actually, in all the cases mentioned by way of (possible) examples of international crime in article 19, paragraph 3, of part 1 of the draft, the United Nations system has been involved in some way or another.⁷

This approach seems supported, at least to a certain extent, by the practice of the United Nations organs, particularly the Security Council. Several authors have highlighted the Security Council's responses to past situations where peoples' rights to self-determination were endangered by racist regimes (in Southern Rhodesia and South Africa).⁸ More recently, the measures taken by the Security Council in the face of a situation of territorial occupation (in the case of Iraq's invasion of Kuwait), in response to acts of genocide (in the former Yugoslavia and Rwanda) and in response to acts of international terrorism (the Lockerbie bombing) have been highlighted.⁹ In the

⁶ Third Report on the Content, Forms and Degrees of International Responsibility, *ILC Yearbook* (1982), vol. II, Part One, at 48, para. (4).

⁷ *Ibid.*, paras (4) and (14).

⁸ See, *inter alia*, the analysis of this practice (and the references to the relevant resolutions) in Mariano Aznar-Gómez, *Responsabilidad internacional del Estado y acción del Consejo de seguridad de las Naciones Unidas* (2000) 101 *et seq*; Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) 55, at 64; N.H.B. Jørgensen, *The Responsibility of States for International Crimes* (2000) 133 and 173 *et seq*.

⁹ *Ibid.*

case of the Gulf War, the Security Council paid particular attention to the problems of responsibility arising from Iraq's actions by creating a highly developed reparations machinery in the form of a compensation fund and committee.¹⁰ The involvement of the 'organized international community' in this process was highlighted clearly by P.M. Dupuy, for whom:

the implementation of Iraqi responsibility was thus institutionalized ... [T]he unanimous response of the international community was not just at the origin of cessation of the original wrongful act. It extended beyond that through the determination of, and strict international control over, the effectiveness of reparations. This is confirmation that this responsibility is that of a State towards not just the countries most directly affected by its actions, but also towards the international community as a whole, the *ordre public* of which it had deliberately defied.¹¹

As several observers have insisted, it is the increasingly broad vision that the Security Council has developed of the notion of 'international peace' (and hence of its response to situations it felt threatened international peace and security) that enabled the Security Council to take measures aimed at putting an end to the — relatively — diversified situations that had the common feature of being defined as international crimes within the meaning of Article 19 of the Ago Draft.¹² Even if the mechanisms of Chapter VII of the UN Charter are thus regarded as the primary responses to international crimes,¹³ other responses also falling within the framework of the Charter (such as the suspension of a member's rights, or exclusion) have also been contemplated by the authors.¹⁴ Finally, again following the same logic, it has been noted that several international agreements reserved an important place for the UN organs in response to certain conduct which these agreements specifically define as international crimes (this is the case *inter alia* for the Convention on Genocide and the

¹⁰ See SC Res. 687 (1991). See also, *inter alia*, d'Argent, 'Le fonds et la commission de compensation des Nations Unies', 25 *Revue Belge de Droit International* (1992) 485; Paolillo, 'Nature et caractéristiques de la procédure devant la commission d'indemnisation des Nations Unies', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de sécurité* (1993) 287.

¹¹ Dupuy, 'Après la guerre du Golfe ...', 95 *RGDIP* (1991) 635 (translated from the French original). See also in the same sense Aznar Gomez, *supra* note 8, at 149. It is interesting to note that the Security Council's response to this typical situation of international crime (within the meaning of Article 19 of the Ago Draft) nonetheless consisted of a measured (and to say the least partial) application of the classical rules of international law relating to reparations, having regard to the fact that the rigorous implementation of these rules would have been contrary to the interests of international peace and security, as this would have been hard for Iraq to support financially (on this point, see d'Argent, *supra* note 10, at 517–518).

¹² On this broad conception of the concept, see, *inter alia*, Dupuy, 'Sécurité collective et organisation de la paix', 97 *RGDIP* (1993) 619 and 623. See more generally Sorel, 'L'élargissement de la notion de menace contre la paix', in Société Française pour le Droit International (ed.), *Le Chapitre VII de la Charte des Nations Unies* (1995) 3–57.

¹³ See, *inter alia*, Simma, *supra* note 1, at 311.

¹⁴ *Ibid.*, at 312; see also, though in less detail, Conforti, 'The Institutional Framework', in J.H.H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 266 *et seq.*

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques).¹⁵

It was, on the one hand, arguments associated with the ‘logic of the system’ (the response of the ‘organized’ international community to acts seriously threatening its fundamental values) and, on the other hand, a finding drawn from the practice of UN organs in response to situations constituting international crimes, that led Riphagen and a number of authors to conclude that the consequences of international crimes could be dealt with only within the framework of the structures and mechanisms of the UN.

However, two considerations have led some commentators to doubt the efficacy or appropriateness of recourse to UN organs and mechanisms to cope with the consequences of international crimes. The first occasion for doubt was essentially conjectural: the effects of the ideological oppositions of the Cold War on the functioning of the United Nations organs were, in the 1980s, too obvious for there to be any illusions as to the possibilities of effectively applying the mechanisms of Chapter VII of the Charter in response to a serious breach of a norm of essential importance to the international community.¹⁶ But the development of the Security Council’s activity following the end of the Cold War clearly had the effect of removing this doubt.

This development had the further consequence of leading some to draw more radical conclusions regarding the very utility of establishing a separate system of aggravated responsibility based on the notion of crime. Several objections were in fact formulated against the very principle of setting up such a separate system, on the ground that the present UN system was more than able to deal with the bulk of situations involving serious breaches of peremptory norms of international law. The idea of ‘institutional redundancy’ was put forward by certain states in their comments on the ILC’s Draft Articles.¹⁷ Rather than simply saying that a system of aggravated international responsibility ought to come under the framework of the machinery and procedures set up by the United Nations Charter, these objections tended to call the relevance or even the utility of such a system more fundamentally into question. In the same sense, the present Special Rapporteur, James Crawford, concluded in his first report on state responsibility that the development of the notion of an international crime ought to remain very limited in the Draft Articles.¹⁸ We know that this was indeed the case, since the very notion of an international crime was finally dropped by

¹⁵ See Aznar Gomez, *supra* note 8, at 56–57. Thus, Article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, provides that: ‘Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.’

¹⁶ See, e.g., though implicitly, the observations by Sir Sinclair, ‘State Crimes Implementation Problems: Who Reacts?’, in Weiler, Cassese and Spinedi, *supra* note 14, at 257; see also Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 825, at 838 *et seq*; similarly, see the First Report on State Responsibility by James Crawford, UN Doc. A/CN.4/490/Add.3, para. 79.

¹⁷ See especially the comments by the United States reproduced in 37 ILM (1998) 475.

¹⁸ *Supra* note 16, at para. 80.

the ILC, to be replaced by that of a 'serious breach of obligations under peremptory norms of general international law'. The institutionalization of the mechanisms for implementing this type of aggravated responsibility can in turn be seen to have been reduced to a minimum. As the ILC put it in its commentary on the (new) Article 40, this provision:

does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the Articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter.¹⁹

These statements seem to reflect a clear feeling that a special system of aggravated responsibility would be only marginally justified given that the UN Charter already offers a framework for responding to situations constituting a threat to international peace and security. The ILC nonetheless did not push the idea of 'institutional redundancy' to its ultimate conclusion (which would have implied quite simply dropping its hierarchy of responsibilities in the international legal system), and confined itself instead to adopting a minimalist system, in particular in relation to the structuring of responses to serious breaches of peremptory norms of international law.

But objections of another, more fundamental, nature have also been brought against this retreat to the UN mechanisms alone. The question many commentators asked was whether the UN Charter truly offered appropriate procedures capable of being used for the purposes of determining the existence of a situation of international crime and of adopting adequate response measures to such serious breaches of international law.²⁰ As we shall see below, the mere reference to the mechanisms and organs of the UN system was the object of many and varied criticisms.

B The Inadequacy or Unsuitability of Existing UN Mechanisms for Implementing a System of Aggravated Responsibility

The various proposals aimed at bringing responses to international crimes or serious breaches of peremptory norms of international law within the UN institutional framework raised a number of objections and encountered various problems. Some of the objections made to a recourse to existing institutional mechanisms were based on the specific features of the system of aggravated responsibility initially contemplated by the ILC. In particular, the 'criminal' connotation of this responsibility largely accounts for the reticence expressed by scholars towards the recognition of a role for a political body like the Security Council in implementing this type of responsibility: by its nature, said the critics, this should have required the involvement of a judicial

¹⁹ ILC Report on its 53rd Session, *supra* note 2, at 286, para. (9).

²⁰ See, *inter alia*, in this connection Riphagen's questions in his Fourth Report on the Content, Forms and Degrees of International Responsibility, *supra* note 3, at 31 and 32, para. 64.

rather than a political body.²¹ It is clear that, however founded these criticisms may have been, objections of this nature largely lost their relevance once the ILC decided to drop the concept of an international crime and therefore its ‘criminal’ context. Arguments of this type, being closely connected to the ‘criminal’ context, will therefore not be considered further in this article. But, over and above these reservations, many doubts were raised as to the suitability of recourse to the organs or procedures of the United Nations to the system of aggravated responsibility contemplated by the ILC.

In most of the proposals just described, the Security Council was called on to play a decisive role in determining whether a given situation constituted an international crime, and in determining the consequences to attach to such a finding. The role of the Security Council in implementing the system of responsibility for crimes was severely criticized. These criticisms related to three essential points: the limitations *ratione materiae* on the competences of the Security Council and the specific features of its approach under Chapter VII of the Charter; the relativity of the qualifications likely to be applied by the Security Council in this context; and, finally, the Security Council’s legitimacy as a body acting in the name of the international community.

Regarding the first of these points, many commentators have pointed out that Chapter VII of the Charter gave the Security Council exclusive powers in relation to the maintenance of international peace and security, an area of law distinct from that of international responsibility. Moreover, the possibility of the Security Council implementing the measures provided for in Chapter VII of the Charter against a state that could not be accused of any wrongful act demonstrated this clearly.²² The fact that the Security Council acts as a political rather than a judicial body when acting within the framework of Chapter VII also raised concerns. The fact that considerations of international legality do not have a central place in the Security Council’s exercise of its competences in the area of collective security, even though such considerations are clearly essential in applying a system of international responsibility, gave particular cause for concern.²³

The second objection to involving the Security Council in implementing a system of aggravated international responsibility has to do with what might be called the ‘relativity of qualifications’. The essentially political nature of the Security Council’s actions in relation to the maintenance of international peace and security has the logical corollary of granting very broad discretionary power to the Security Council, both in exercising its power of qualification and in implementing the coercive measures it may adopt under Chapter VII in order to ensure a return to peace.²⁴ Several authors have expressed discomfort in this connection, given that it is apparent

²¹ See, *inter alia*, the objections raised by Jørgensen, *supra* note 8, at 214.

²² See, *inter alia*, the summary of the discussions at the ILC on this point in the course of the 1980s in Spinedi, ‘International Crimes of State: the Legislative History’, in Weiler, Cassese and Spinedi, *supra* note 14, at 126–127.

²³ See Aznar-Gómez, *supra* note 8, at 47 and 49 (and the references cited) and 160–161.

²⁴ See, *inter alia*, on this point, Cohen Jonathan, ‘Commentaire de l’article 39’, in J.-P. Cot and A. Pellet (eds), *La Charte des Nations Unies — Commentaire article par article* (1985) 646 and 651.

in practice that the Security Council has frequently treated essentially identical situations very differently, responding to some by employing the mechanisms of Chapter VII while remaining largely passive in relation to others. Such differences in treatment seem hard to accept when it comes to determining the existence and consequences of the most serious breaches of peremptory norms of international law.²⁵ The recognition of the exclusive power of the Security Council to establish the existence of an international crime would prove particularly problematic in this connection,²⁶ since it would inevitably imply that situations presenting all the constituent features of an international crime might no longer be treated as such because of an abstention — *ex hypothesi* politically motivated — of the Security Council. Conversely, the absence of review of the qualifications applied by the Security Council might also raise particular problems. As has been pointed out, qualifications applied by the Security Council seem hard to challenge, which increases the risk of arbitrary behaviour in such an obviously delicate matter:

While collective responses are to be preferred to the more arbitrary, anarchic and possibly more destabilizing unilateral ones, the problem is that while the qualification of an act as a prior condition to the application of countermeasures by a State may eventually (though not necessarily) be opened to challenge by the judge or arbitrator, those taken by the Council in connection with its primary responsibility in peace maintenance are authoritative and binding, and when linked to determinations under Article 39 not subject, as such, to judicial review.²⁷

The risk then would be of replacing one subjectivity (of states) by another (of the Security Council), a risk that would be only slightly attenuated by the more collective nature of the decision-making processes of the Security Council, without it being possible for the state concerned to employ any outside review mechanism.

The characteristic features of the Security Council's operation, considered from a more organic viewpoint, also constitute one of the elements of the third type of criticism made against recourse to the Security Council for the purpose of implementing aggravated international responsibility. How can one in fact claim that the Security Council represents the 'international community' while the legitimacy of the Security Council is being questioned with steadily increasing insistence both in academic circles²⁸ and in the UN itself?²⁹ The recognition of such a primary role in the area of interest to us for a body largely regarded as politicized, 'opaque', unrepresentative, and with oft-disputed legitimacy therefore seems equally problematic.³⁰

²⁵ See, *inter alia*, Jørgensen, *supra* note 8, at 137, 213 and 238.

²⁶ See, *inter alia*, A. de Hoogh, *Obligations Erga Omnes and international crimes* (1996) 398.

²⁷ Gowlland-Debbas, *supra* note 8, at 73–74.

²⁸ See, *inter alia*, Aznar-Gómez, *supra* note 8, at 45 and 166–167; and Gowlland-Debbas, *supra* note 8, at 71. The sharpest recent critique is undoubtedly the one by Arangio-Ruiz, 'On the Security Council's "Law-Making"', 83 *Rivista di diritto internazionale* (2000) 609–725.

²⁹ In this connection, see in particular the debates in the General Assembly on the 'Question of equitable representation on the Security Council and increasing the number of its Members', October 2001, during the 55th session (available at www.un.org/News/fr-press/docs/2001/AG1214.doc.htm).

³⁰ On this point, see also the criticisms by Arangio-Ruiz, 'Article 39 of the ILC First-Reading Draft Article on State Responsibility', 83 *Rivista di diritto internazionale* (2000) 749.

All the same, these various criticisms of the use of the institutional framework of the United Nations Charter (specifically the Security Council) for the purposes of implementing aggravated international responsibility have not, however, had the effect of rendering the proposals for developing new institutional structures for the same purposes any more acceptable.

2 Institutionalization of Responses to International Crimes or Serious Breaches of Obligations Resulting from Peremptory Norms by Creating New Institutional Structures

The desire, as expressed by a large number of authors, to bring responses to serious breaches of peremptory norms of international law within the institutional framework of the United Nations does not necessarily imply a restriction on the existing mechanisms and organs. Rather than a limitation on the use of the UN institutional structure as existing *de lege lata*, some authors have raised the possibility of solutions *de lege ferenda* (section A below). These proposals have not, however, escaped criticism any more than those that sought to base responses to international crimes and serious breaches of peremptory norms of international law on the existing institutional mechanisms (section B below).

A *The New Institutional Structures*

Proposals for new institutional structures have taken various forms, some of which imply the creation of new bodies, and others the use of procedures created specially for the purpose, while remaining within the framework of the UN. As regards the creation of new bodies, the possibility has been raised for the Security Council or General Assembly to create, following the model of the international criminal tribunals, a subsidiary body with a judicial mission that would have the task of determining whether given circumstances constitute an international crime, and pronouncing upon the consequences that flow therefrom.³¹ Other suggestions include a proposal at the Sixth Committee to establish an independent commission of lawyers that would be endowed with the same competences.³² Other proposals include the creation of new procedures for the existing bodies to apply. In this connection, P.M. Dupuy suggested assigning to one of the UN bodies a role as prosecutor: for example, the General Assembly could vote to condemn the state responsible for an international crime, and the Security Council would then decide the consequences this condemnation would imply in terms of specific responses or 'sanctions'.³³

We can find the same type of scheme in the mechanism proposed by the third

³¹ See Jørgensen, *supra* note 8, at 212 and 214.

³² *Ibid.*, at 214 (and references); see also the ILC Report on the Proceedings of its 47th Session, *ILC Yearbook* (1995), vol. II, Part Two, 56, para. 312.

³³ Dupuy, 'Implications of the Institutionalization of International Crimes of States', in Weiler, Cassese and Spinedi, *supra* note 14, at 182.

Special Rapporteur on State Responsibility, Arangio-Ruiz.³⁴ The Draft he submitted to the ILC indubitably constitutes the most elaborate and most ambitious proposal for a new institutional structure yet conceived for endowing the concept of an international crime with an appropriate implementing system. The complexity of the machinery contemplated undoubtedly justifies reproducing here in almost its entirety Draft Article 19 of the Second Part of the Articles as proposed by the Special Rapporteur:

1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations.

2. If the General Assembly or the Security Council resolves by a qualified majority of the Members present and voting that the allegation is sufficiently substantiated to justify the grave concern of the international community, any Member State of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgement whether the alleged international crime has been or is being committed by the accused State.

3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-third majority of the members present and voting, and in the Security Council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.

[...]

5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any Member State of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in the present part.³⁵

However complex it may seem, this mechanism had the advantage, according to the Special Rapporteur, of bringing in the three principal UN organs in combined fashion 'each bringing into play the role that matched its own characteristics'.³⁶ This formula thus overcame the drawbacks presented by exclusive recourse to each of these bodies in isolation, without needing to amend the UN Charter, and without harming the 'political role conferred by the Charter on the Security Council'.³⁷

Despite the solutions this mechanism would entail for the question of institutionalizing responses to international crimes, the ILC refused to follow it up.³⁸ Many members of the Commission criticized the proposals for a lack of realism. Identical criticisms were made of other proposals of a similar nature for institutional developments.

³⁴ Seventh Report on State Responsibility, A/CN.4/469, *ILC Yearbook* (1995), vol. II, Part One.

³⁵ Reproduced in *ILC Yearbook* (1995), vol. II, Part Two, at 46, n. 117.

³⁶ See the summary presentation of the Seventh Report by Arangio-Ruiz, in *ibid*, at 46, para. 245.

³⁷ *Ibid*, at 46 and 47, para. 246.

³⁸ On the circumstances of the discarding of this part of the Draft, see Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) 425, at 429.

B The Unrealistic Nature of the Proposed New Institutional Structures

The criticisms of the proposals to create new institutional forms highlight in particular the ‘unrealistic’ nature, or lack of adaptation, of these proposals to the structure of contemporary international society.³⁹ Many such criticisms have been made specifically against the Draft Article 19 submitted by Arangio-Ruiz in 1995.⁴⁰ The complexity of the machinery contemplated by the third Special Rapporteur, who brought all the principal UN bodies together in a combined fashion, was particularly criticized.⁴¹ The allotting to the International Court of Justice of a binding competence to determine the existence of an international crime similarly provoked solid opposition, especially since the usefulness and the outcome of the procedure did not seem obvious.⁴² In general terms, the proposals submitted by the Special Rapporteur in 1995 were accused of being ‘too broad to be realistic’ and of not fitting ‘the States’ sense of international law’.⁴³ The creation of new institutional structures for the purposes of implementing a system of aggravated international responsibility thus did not meet with acceptance from the ILC or from states, any more than exclusive recourse to the existing organs and procedures.

In any case, the discarding of the very notion of an international crime in the Drafts subsequently submitted to the Commission by the new Special Rapporteur, James Crawford, in turn much reduced the interest and importance of the questions relating to the degree of institutionalization that the mechanisms and modalities of the response to serious breaches of peremptory norms of international law ought to have. The criticisms made of the various detailed institutionalization proposals seem, moreover, to have played an important part in the dropping of the concept of an international crime, and undoubtedly explain to some extent the difficulties that the various attempts to define a structured, appropriate and convincing system of response to serious breaches of peremptory norms of international law have met with.

On the whole, this brief study of the attempts at institutionalizing the responses to international crimes or serious breaches of peremptory norms of general international law and of the criticisms these attempts have aroused brings about a paradoxical result. These proposals were primarily motivated by the desire to avoid the marked unilateralism implied by recognizing a right of all states to respond to such serious breaches by recourse to the same means of response as recognized to states directly injured (including adoption of countermeasures against the responsible state). Such unilateral responses have in fact often been regarded as factors leading to anarchy and disunity within international society, whereas the institution of a system of aggravated responsibility has the specific aim of uniting the international community in the defence of its fundamental values damaged by international crimes and serious

³⁹ In this connection, see the anticipation by Pierre-Marie Dupuy of the criticisms likely to be made of the proposals he formulated in 1989, which he feared might be branded ‘utopian’ (Dupuy, *supra* note 33, at 183).

⁴⁰ See *supra*, Section 1B.

⁴¹ See the summary of the debates at the ILC in *ILC Yearbook* (1995), vol. II, Part Two, at 55, para. 305.

⁴² *Ibid.*; see also the criticisms made by de Hoogh, *supra* note 26, at 358 *et seq.*

⁴³ *ILC Yearbook* (1995), vol. II, Part Two, at 47, para. 250.

breaches of peremptory norms. This is why there was an intention to reserve a central role for the international community in implementing this aggravated responsibility. Yet the proposals did not meet with unanimous support. Serious doubts were expressed regarding the transposability into the area of international responsibility of the machinery set up by the Charter for ensuring the maintenance of international peace and security. In particular, the dominant part played there by the Security Council raises considerable difficulties. The rather unrepresentative nature of that body has, for some years, given rise to a problem of legitimacy. It therefore appears difficult to treat the Security Council as the secular arm of the 'international community', in whose name it would be the only body empowered to respond to the most serious breaches of the international legal order.

But the attempts to develop mechanisms for responding further to such breaches in order to give this institutional response enhanced legitimacy met with equal resistance. By implying joint action by the principal UN bodies and acknowledging an important role for the International Court of Justice, these proposals, seeking to flesh out a structured, proactive 'international community', were generally rejected because of their lack of adaptation to the current structure of international society. The fate of these proposals clearly raises the question of the possibility of promoting an essentially 'communitarian' concept (that of crime, or serious breach of a peremptory norm), accompanied — logically — by an institutional response mechanism, while the institutionalization — or perhaps the very existence — of the 'international community' at this stage remains at least problematic and uncertain.⁴⁴

It would seem that this finding is not very far from that reached by the ILC at the latest stage of its work, where unilateral action is not ruled out as a response to serious breaches of peremptory norms. Article 54 of the text adopted in December 2001 by the General Assembly at least leaves the possibility open since it provides that:

This chapter [on countermeasures] does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State [other than the directly injured State], to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Therefore, to the extent that all peremptory norms of international law can be regarded as generating obligations *erga omnes* (breach of which gives other states an entitlement to respond under Article 48),⁴⁵ this possibility of unilateral response equally concerns responses to serious breaches of peremptory norms of international law covered by Part Two, Chapter III, of the Draft Articles. This is, to be sure, only 'a saving clause which reserves the position and leaves the resolution of the matter to the

⁴⁴ On this point, see, *inter alia*, Abi-Saab, 'La "communauté internationale" saisie par le droit — Essai de radioscopie juridique', in *Paix, développement et démocratie — Mélanges Boutros Boutros-Ghali*, vol. I (1998) 106.

⁴⁵ On this point, see, *inter alia*, the ILC Report on its 53rd Session, *supra* note 2, at 320, para. (7).

further development of international law'.⁴⁶ It seems nonetheless revealing that the Commission should ultimately have decided simply not to rule out such unilateral responses by states to the most serious breaches of international law. In so doing, the Commission moved away from both the idea of systematically institutionalizing responses to such wrongful acts and the approach that a system of aggravated responsibility would be redundant in institutional terms, having regard to the existing machinery in the United Nations framework.

In reality, the image that now seems to be emerging increasingly clearly is that of a certain subsidiarity between the response of UN organs and that of states not directly injured acting on an individual or collective basis. This is manifest particularly in the case of situations that would simultaneously constitute both a threat to international peace and security and a serious breach of peremptory norms of international law. The measures taken by the Security Council in such circumstances indubitably have the effect of limiting states' room for manoeuvre in terms of individual responses to such wrongful acts.⁴⁷ On the other hand, the Security Council's abstention from taking measures to cope with a situation of this type ought not to prevent member states from responding to such acts independently of this collective inaction, a possibility provided for by Article 48 of the text finally adopted. This situation is no different as regards the specific consequences of serious breaches of peremptory norms in the terms of Article 41. The commentary on this provision testifies to the flexibility the Commission has displayed towards responses to wrongful acts of this type, given that the institutionalization of responses is only one of the solutions contemplated in the context of this text:

Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.⁴⁸

No mode of response (institutionalized or 'collective outside the institution') has therefore been ruled out by the Commission.

⁴⁶ Commentary on Article 54 in the ILC Report on its 53rd Session, *supra* note 2, at 355, para. (6). The commentary adds in the same vein that it talks of "'lawful measures'" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole' (*ibid.*, at para. (7)).

⁴⁷ The extent to which states' room for manoeuvre is restricted in such situations has been the object of debate among scholars: see in particular de Hoogh, *supra* note 26, at 249–251. One might also, in this connection, wonder how far the measures adopted by the Security Council in the context of the role conferred on it by the Charter should be subjected to the limitations by respect for which the International Law Commission has conditioned implementation of countermeasures.

⁴⁸ ILC Report on the Proceedings of its 53rd Session, *supra* note 2, at 286 and 287, para. (2). In the same vein, the Commission had already asserted that obligations incumbent on all states under Article 53 of the 1996 Draft 'would arise for each State as and when it formed the view that a crime had been committed. Each State would bear responsibility for its own decision, although it may be added, there may be cases in which the duty of non-recognition or the duty of non-assistance, for example, might flow from mandatory resolutions of the Security Council or other collective actions duly taken.' *ILC Yearbook* (1996), vol. II, Part Two, at 71, para. (4).

The idea of an ‘alternative’ response (whether by the UN or by states) or a subsidiary response (a response by member states failing action by the UN) is not new — far from it.⁴⁹ Undoubtedly, one cannot but conclude that this solution is certainly the one that best suits the state of contemporary international society, pending the emergence of a genuine ‘international community’ which to date remains more ‘fantasy’ than real.

⁴⁹ See, *inter alia*, the questions raised in 1989 by Simma, *supra* note 16, at 842; and the conclusions reached by Frowein regarding previous ILC work: Frowein, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’, 248 *RdC* (1994-IV) 412.